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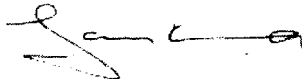
Ms. Magalie R. Salas
Federal Communications Commission
The Portals
445 Twelfth Street, SW
Washington, D.C. 20554

RE: Ex Parte Communication in CS Docket No. 95-184 and Docket No. WT 99-217

Dear Madam Secretary,

Enclosed is a document relating to CS Docket No. 95-184, regarding MDU Inside Wiring Rules. It has been submitted to Mr. Carl Kandutsch of Cable Services Bureau.

Sincerely,



Larry Kessler
CEO
InteliCable

Enclosure: White Paper

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Exclusive Contracts

Over time, the notion of “convergence” has lead many to believe that the technologies and services of voice, video and high speed data mean one thing. In fact, comments from petitioners to the Wireless Bureau are predicated on the notion that wireless technologies and services produce the same result as wired technologies and services, therefore, they should be considered one in the same. While they are fundamentally correct in regard to the end result achieved, the means by which these results are achieved are in no way similar.

The economics associated with the provision of telephony services, particularly those delivered via wireless, are significantly different than video service delivered by a competitor to franchise cable. Not only are the wireless companies heavily funded by both the market and venture capital, they are also well in place with much of their infrastructure.

These companies (telephony) are far better funded than their alternative video counterparts. The CLECs are competing in a marketplace that is awash with almost an uncountable number of competitors. The list of companies from which to choose local and long distance services for both residential and business customers is long. Since 1996, the number of CLEC and long distance service resellers has not only become exhaustive, but continues to grow on a monthly basis. It is for this reason alone, that no such providers should be granted exclusivity to a given property.

The Bells have been forced to open up their network infrastructure to CLECs. The initial investment is low for CLECs. The technologies are already in place for CLEC customers to seamlessly switch from one provider to another. It is for the lack of these things (extensive funding, low cost entry, direct access to switching and routing facilities and high market demand) that competitive video service providers must have the right to enter into exclusive agreements.

However, competitive video service providers, particularly in the MDU marketplace, do not have access to the incumbent’s network infrastructure, broadcasting facilities, on-premises equipment or inside wiring, as do their telephony counterparts. They also do not have access to the same level of capital. As such, they are forced to strategically create a marketplace for themselves, where CLECs have had significant assistance from the Federal Government. As such, until nearly the same level of competition is created for competitive video service providers as has been created for telephony service providers, which could only be done by forcing franchise cable operators to open up their cable systems and infrastructure in the same way the Bells have been forced to open theirs to CLECs, these companies (competitive video service providers) require exclusivity so they can grow into an economically viable market force.

Competitive telephony, most particularly wireless, can not be considered one in the same with competitive video services. It is not the technologies and the end result of how these services “converge” that should dictate the decision of exclusivity, but rather the business models and economic viability for that sector of the competitive telecommunications marketplace (video) as it differs from telephony.

Gatekeeper Theory: It has been posited that MDU owners are the barriers to competition and that to grant them the ability to enter into an exclusive agreement with a video service provider will serve only to further empower them as barriers to competition. This is incorrect.

Numerous building owners have elected to secure services from franchise cable operators in an effort to remove a lesser competitive private cable operators despite revenue sharing opportunities. In some cases, the owner is willing to do this even under the grounds of wrongful termination. The reason for this is that the MDU owner can not afford to loose rent revenues from residents who desire to either not renew existing leases or enter into new ones because there is bad cable service. The point of this is that owners base their decisions on what effects rental revenues, rather than cable revenue sharing. Revenue sharing is not the driving force for an MDU owner's decision.

Continuing with perceptions of the Gatekeeper Theory, the theory must be predicated solely on the notion that an owner can only derive ancillary income from a private cable operator, as this has been the foundation for those who claim owners enter into exclusive agreements for the sake of greed, and to the detriment of their residents. This is not the case.

Virtually all of the MSOs providing cable services throughout the United States also offer contracts by which owners can receive revenue sharing. In virtually every case, the revenue sharing offer today is essentially the same between the incumbent franchise cable operator and the private cable operator. This has resulted simply from what little competition there is within the MDU video service marketplace. The fact that revenue sharing is offered by both franchise and private cable operators invalidates the theory that owners enter into exclusive service agreements with private cable operators simply for revenue sharing, when they can acquire the same revenue sharing opportunities from franchise cable operators.

Example

On a typical 200 unit apartment complex there will be an average of 95% occupancy. This results in 190 occupied units. Assuming the high end of a national average cable penetration of 70% per apartment complex, 133 of the 190 occupied units will receive video services. With an average cable bill of \$35.00, the gross revenue to the cable operator (private or franchise) is \$4,655.00. Nationwide, the average percentage of revenue sharing is 8% to 10%. At 8%, an MDU owner will receive \$372.00 per month. At 10%, the owner will receive \$466.00.

The average national rent is \$750.00 per month. In comparing the average rent received by a property owner and the amount of money received by revenue sharing, it is not difficult to understand that an owner can not afford to select a video service provider, if that provider's service results in the loss of even a single renewed or new lease. This further invalidates the Gatekeeper Theory.

Many MDU portfolios are reducing their use of private cable services. The economics of competitive video service providers and their lack of access to the incumbent's system and network infrastructure is a significant problem. These things lead to the conclusion that the

FCC's providing competitive video service providers with the option of entering into exclusive contracts is the single most critical element required to develop adequate competition within the MDU marketplace.

Given the advent of recent bankruptcies by competitive video service providers such as Cable Plus, OpTel and SkyView, in addition to sales of competitive video systems to franchise operators by Global Interactive Communications (formerly ICS) and Mid-Atlantic, the need is further substantiated to provide these competitive video service providers with at least one tool with which to compete against the franchise cable giants. This tool is the right to enter into exclusive agreements with MDU owners. The premise of this argument is not to provide a benefit to the MDU owner. It is to provide a pathway to create competition for video services in the MDU marketplace, where the current level of competition is steadily decreasing. Although the latest Cable Competition Report indicates an increase in the number of units served by SMATV/PCO operators, this data predates the OpTel, Cable Plus and SkyTel bankruptcies, as well as the sale of contracts from PCOs to MSOs.

Competitive video service providers do not have access to large market capital. They do not have access to the incumbent's network infrastructure, as do telephony providers through both CLEC laws and the recent Advanced Services Ruling. They do not have the luxury of already having a firmly entrenched market that has been seasoned over several decades. They do not have the benefit of regulatory protection such as mandatory access. To remove their right to enter into exclusive contracts then will serve to systematically remove the only economically viable tool available for them to succeed. For competition of video services in the MDU market to succeed. At that time no viable competition for video services will be presented against what will become the resurrection of franchise monopolies.

In closing, it is important to understand that many of the issues related to competitive video service providers, the MDU owner gatekeeper theories, and other comments that may lead to the conclusion that exclusive contracts should not be permitted, typically predate the cable company mega-mergers and system-swaps. They predate the MSOs extensive efforts to upgrade franchise cable systems for the delivery of digital video, high speed Internet and telephony services.

Inside Wiring

The current Ruling states that once a cable operator no longer has a legally enforceable right to remain on the premises, the owner may provide him notice of termination. Upon its receipt of such termination, the incumbent provider has 30 days to elect one of its options to either (1) to abandon without disabling the wiring; (2) to remove the wiring and restore the MDU consistent with state law; or (3) sell the inside wiring. Should the incumbent elect to sell the wiring, both parties have 30 days during which they can negotiate a selling price. Once the 30 days has expired, the incumbent provider is required to elect (1) to abandon without disabling the wiring; (2) to remove the wiring and restore the MDU consistent with state law; or (3) to submit the price determination to binding arbitration by an independent expert. This Rule is flawed in primarily two (2) respects.

The Rule empowers the incumbent with the right to prevent the owner from purchasing the wiring on two separate occasions, thereby blocking greater competition amongst video service providers within the MDU marketplace. This contradicts the spirit of the Ruling. Competition is denied by virtue of the fact that the owner does not have the option to purchase the wiring unless the option is granted by the incumbent. This empowers the incumbent to obstruct the entrance of competition to an MDU property.

The inside wire ruling is predicated on the notion that granting these three options to the incumbent prevents its argument that Fifth Amendment Rights are violated. These were put in place to prevent a "taking" of the incumbent's property, the inside wire. According to the premise of the ruling, so long as the incumbent is compensated for its inside wiring, its Fifth Amendment Rights can not be violated. Therefore, so long as such compensation takes place, the incumbent can not be harmed. As such, there can be no violation of the incumbent's rights if the right to purchase is first granted as an option at the election of the owner, upon termination of the agreement, as opposed to the incumbent provider blocking the owner's right to exercise this option, as the provider is empowered to do so under the current Ruling.

Trained and skilled account executives representing incumbent video providers are able to confuse and bring great concern to owners about the disruption to residents when wiring is removed and services do not have a smooth and seamless transition from one provider to the next. Concern of this alone induces many owners to enter into new agreements with the incumbent providers. The net effect of the current ruling then is to further suppress the fostering of competition for video services within the MDU marketplace. Competitive video service providers are not able to expand their presence within the marketplace economically, unless they are able to secure access to the inside wiring through the property owner. This can not take place unless the owner is first granted the right to purchase the wiring. This is currently not the case.

The second anti-competitive effect of the current ruling occurs after the 30 days of negotiating a price for the wiring has expired, without result. In what will appear to be a good faith effort by the incumbent provider, they may first elect to offer the sale of the wiring, buying time to continue "selling" the owner on signing a new agreement. If during this time they are unable to sell the idea of a new contract, they can effectively force their hand again by simply asking for a price greater than what the owner would ever be willing to pay. Next, per paragraph 43 of the Ruling, the incumbent can then still elect to threaten removal of the wiring as per option two of its three options. Unfortunately, the arbitration provision is not forced by the Ruling, it is only one of the three (3) options offered, and is exercised only at the incumbent's election to do so.

Effectively, the current Ruling serves only to empower the incumbent provider, which by virtue of its direction, allows the incumbent to forcibly prevent competition for video services within the MDU marketplace. The ruling then, as it acts within the marketplace, facilitates anti-competitive market practices.

Most have concluded that the removal of inside wiring is impractical for both logistical and financial reasons. As such, the practicality of removing such wiring does not take place. Based on these facts, the only viable explanation for removing the wiring would be to either intimidate

the property owner or for the incumbent provider to demonstrate its overwhelming market presence to both the MDU owner and the competitive video service provider.

Logically

- So long as the ruling provides for a vehicle to compensate the incumbent for the inside wiring, the FCC makes clear that it believes there is not a taking of the incumbent provider's property. The sale and purchase of such wiring prevents a violation of the incumbent's Fifth Amendment Rights. As such, the incumbent's rights will not be violated if the option to purchase the wiring is at the owner's election, and is mandated to binding arbitration if a price is not agreed upon.

As the current Rules are written, the MDU owner is provided with no option to acquire access to the inside wiring, except at the election of the incumbent provider's decision to grant such access. This seems to violate the spirit of the Rules. At a minimum, it places into the hands of the dominate franchise cable operators, the power to block video service competition in the MDU marketplace. The theory of the Rules is one thing. The market reality of how it is being used is quite another.

Empowering the incumbent to obstruct competition is the end result of the current Rules.